

NOT FOR PUBLICATION

NO. 24759

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ASSOCIATION OF APARTMENT OWNERS OF
HALE UMI, through its Board of Directors,
Plaintiff-Appellant, v. PAUL A. ARTERO,
Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE
FIRST CIRCUIT COURT
(CIV. NO. 1RC01-1516)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

The Association of Apartment Owners of Hale Umi (the Association or plaintiff) appeals the October 29, 2001 judgment, and the findings of fact, conclusions of law and order of even date underlying the judgment, entered after a bench trial in the district court of the first circuit in favor of Paul Anthony Artero (Artero or defendant), on a complaint brought by the Association against Artero for unpaid maintenance fees and late charges thereon. We vacate and remand for entry of judgment in favor of the Association and against Artero, and for further proceedings not inconsistent with this opinion.

I. Background.

On February 28, 2001, the Association filed a complaint against Artero, alleging that, as of February 16, 2001, Artero

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owed the Association a total amount of \$2,145.25, comprised of \$1,902.45 in maintenance fees and \$242.80 in late charges. The Association also demanded court costs, interest and reasonable attorneys' fees. Attached to the complaint was a partial copy of an agreement of sale of apartment 3-K of the Hale Umi condominium project, registered in the Land Court on April 28, 1995, showing Savio Development Co., Inc. (Savio or SDCI) as seller and Artero as buyer. Also attached to the complaint was a partial copy of the by-laws of the Association, which were registered in the Land Court on May 17, 1994.

At the June 21, 2001 bench trial,¹ the following transpired:

(case called)

MS. HARADA: Good morning, Your Honor. Arlette Harada, for the plaintiff, Association of Apartment Owners of Hale Umi.

THE COURT: All right.

DEFENDANT: Good morning. Paul Artero, Your Honor.

THE COURT: Okay. So Mr. Artero, you're representing yourself, correct?

DEFENDANT: Yes.

THE COURT: All right. Just want to make that clear. And the Court understands this is a matter of association maintenance fees? Is that correct?

MS. HARADA: That's correct, Your Honor.

THE COURT: And late charges.

MS. HARADA: Right.

THE COURT: Other than what's on the complaint form amounts, are there any additional claims here, or amounts that have been accrued?

MS. HARADA: No. Just that further attorney's fees have been accrued.

THE COURT: All right.

MS. HARADA: Oh, I'm sorry. Maintenance fees accrue as time goes on, so there would be an adjustment on maintenance and late fees. It's based on that.

¹ The Honorable Hilary Benson Gangnes, judge presiding.

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THE COURT: Because the complaint was filed back in February, with maintenance fees showing \$1,902.45.
MS. HARADA: The current --
THE COURT: And then some late fees.
MS. HARADA: Okay. The current maintenance is \$2,529.45. And the current late is \$368.30.
THE COURT: I'm sorry. 2,500 --
MS. HARADA: 529.45.
THE COURT: Okay.
MS. HARADA: And late of 368.30.
THE COURT: All right. Okay. And in terms of witnesses today?
MS. HARADA: The property manager, Terry Imamura.
THE COURT: And Mr. Artero, do you have any witnesses besides yourself?
DEFENDANT: No, Your Honor.
THE COURT: Okay. So it's your -- your testimony.
DEFENDANT: Right.

. . . .

TERRY IMAMURA,
a witness called by the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HARADA:

MS. HARADA: Okay. Can you state your name for the record.
WITNESS: Terry Imamura.
Q And what is your business address?
A 3179 Koapaka Street, Second Floor.
Q And who's your employer?
A James McKellar, (sic) Certified Management, Inc.
Q And what is your position there?
A I am the property manager/account executive.
Q Okay. Are you the property manager for the plaintiff, Association of Apartment Owners of Hale Umi?
A As my current status is, yes.
Q Is Certified Management the management -- managing agent for Hale Umi?
A Yes.
Q In your capacity as the Condominium Association's manager, are you the custodian of the books and records of the Hale Umi?
A Yes.
MS. HARADA: I'm going to show you what's been marked as plaintiff's exhibit 1. Can you tell us what that is?
A These are basically the by-laws set up by the Association and the developer as they first were coming into being.
MS. HARADA: Okay. And this copy here is not a complete set. Is that right?
A No. It looks like it's missing some other information.
MS. HARADA: Article -- can you turn your attention to Article 2,

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section 2 of the by-laws.² And can you tell us what the section that I've high-lighted for you says?

A Section 2 is qualifications. Basically, it's saying that all owners of the apartment [(sic)] of the project shall constitute the association. That the owners of the apartment, upon acquiring title, shall automatically become a member of the association, and therefore until such time that they give up ownership, the association -- basically, they belong to the association, period, as far as that is concerned.

Q Okay. And does that address also purchasers and their agreements of sale?

A Yes.

Q Okay. And what does it say about that?

WITNESS: I'm sorry.

MS. HARADA: It's the high-lighted section.

A To such extent and for such purposes, including voting, and [(sic)] shall be provided by any lease or agreement of sale of any apartment recorded in the Land Court, the lessee of such apartment, or the purchaser thereof, shall be deemed to be an owner thereof.

So, in other words, the agreement of sale owner is part of the association.

MS. HARADA: Okay. Can you turn your attention to Article 9, Section 1.³ And what does the first sentence of that provision

² Exhibit 1, a copy of selected pages from the by-laws of the Association of Apartment Owners of Hale Umi (the Association), in Article II, Section 2, contains the following provisions:

All owners of apartments of the Project shall constitute the Association. The owner of any apartment upon acquiring title thereto shall automatically become a member of the Association and shall remain a member thereof until such time as his ownership of such apartment ceases for any reason, at which time his membership in the Association shall automatically cease; provided, however, that to such extent and for such purposes, including voting, as shall be provided by any lease or agreement of sale of any apartment recorded in the Land Court, the lessee of such apartment or the purchaser thereof shall be deemed to be the owner thereof; provided, further, that the seller under an agreement of sale may retain the right to vote on matters substantially affecting seller's security interest in the apartment as provided in [Hawaii Revised Statutes (HRS) § 514A-83].

³ Exhibit 1, in Article IX, Section 1, contains the following provisions:

The owner of each apartment shall be liable for and pay a share of the common expenses in proportion to the percentage interest in the common elements appurtenant to such owner's apartment, and the same shall be deemed to be common expenses, as the term is herein used. Common expenses shall include all charges, costs and expenses whatsoever incurred by the Association for and in connection with the administration and operation of the Project, including, without

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provide?

A The owner of each apartment shall be liable for, and pay a share of, the common interest expense, in proportion with the percentage of common interest, elements pertaining to such owner's apartment. Basically it means that maintenance fees, et cetera, will be assessed against the unit.

MS. HARADA: Okay. And can you now turn to Article 9, Section 5.⁴ And can you read the section that is high-lighted there.

WITNESS: Sure. Such owner shall pay, in addition, assessment of \$10 for each such failure on all delinquent assessments, and shall bear interest at the rate of 1% per month from the assessment due date.

MS. HARADA: Okay. And so this in regards to late fees and assessments --

WITNESS: Correct.

MS. HARADA: -- for late payment. Okay. And were the -- have the computations that were performed to assess late fees on the account in question performed according to that provision?

A Yes.

limitation, all charges for . . . necessary expenses for upkeep, maintenance, management and operation actually incurred on or for the common elements[.]

⁴ Exhibit 1, in Article IX, Section 5, contains the following provisions:

Each monthly assessment and each special assessment shall be separate, distinct and personal debts and obligations of the owner against whom the same are assessed. If an owner shall fail to pay such owner's assessment when due, such owner shall pay an additional assessment of TEN AND NO/100 DOLLARS (\$10.00) for each such failure and all delinquent assessments shall bear interest at the rate of one percent (1%) per month from the assessment due date. . . . In the event of a default or defaults in payment of any such assessment or assessments then in addition to any other remedies herein or by law provided, the Board may enforce each such obligation as follows:

(A) By suit or suits at law to enforce each such assessment obligation. . . . Any judgment rendered in any such action shall include, where permissible under any law, a sum for reasonable attorneys' fees in such amount as the court may adjudge against such defaulting owner.

(Capitalization in the original.) HRS § 514A-94 (a) (Supp. 2002) provides, in relevant part, that "[a]ll costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for . . . [c]ollecting any delinquent assessments against any owner's apartment . . . against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property shall be promptly paid on demand to the association by such person or persons[.]"

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MS. HARADA: Can you turn now to Article 13, Section 3.⁵ It is on page 2. Okay. Can you tell us what that says in terms of collections for delinquent assessments?

A Basically it's saying that attorney's fees, and expenses of enforcement of collection of maintenance fees, or collecting any delinquent assessments against any homeowners [(sic)] apartment, and all costs incurred will be the responsibility of the homeowner.

Q Now, who was the owner of Unit 3K at the Hale Umi?

A Paul Artero.

MS. HARADA: And can you -- make [(sic)] I ask that exhibit 1 be entered into evidence.

THE COURT: And Mr. Artero, you don't have any objection to exhibit 1 being admitted into evidence.

DEFENDANT: No, no objection, Your Honor.

THE COURT: Exhibit 1 is admitted into evidence.

MS. HARADA: Can you take a look at exhibit 2.⁶ Can you identify first what that is.

WITNESS: Basically this is a document of agreement of sale between two parties -- between Savio Development and Paul Artero.

MS. HARADA: Okay. And that -- does that concern Unit 3K at the Hale Umi?

A Yes.

MS. HARADA: Okay. And did Certified Management receive a copy of this agreement of sale?

A Yes.

MS. HARADA: Okay. And did Certified Management set up an account for Mr. Artero, based upon this agreement of sale?

A Yes.

MS. HARADA: And I'm going to ask you to turn your attention to paragraph 3 on page 3, the agreement, and can you tell us what that provides?

A Paragraph 3, it taxes assessment and other charges. In addition to the buyer's obligation under paragraph 2, which is the purchase price, the buyer shall pay all real estate taxes, all assessments of every kind and nature levied against the premises, lease

⁵ Pertinent provisions of Article XIII, section 3 in Exhibit 1 mirror relevant provisions of HRS § 514A-94(a), supra.

⁶ Exhibit 2 is a copy of the agreement of sale of apartment 3-K of the Hale Umi condominium project, between Savio Development Co., Inc. (Savio), as seller, and Paul Anthony Artero (Artero), as buyer, recorded in the Land Court on April 28, 1995. The purchase price was \$113,800.00, via down payment of \$250.00 and monthly payments of \$905.50 commencing May 1, 1995, with the entire unpaid balance due on the final payment date, April 1, 2000. The agreement of sale also provided, in pertinent part, that

Buyer shall pay . . . all assessments of every kind and nature levied against the premises, . . . maintenance fees, . . . and all other charges of whatsoever kind or nature levied or assessed by any lawful authority upon or against the premises, or the use thereof, whether the same are charged to Seller or Buyer.

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rent if any, maintenance fees, insurance premiums, and all other charges, whatsoever kind or nature, levied against -- levied or assessed by any lawful authority upon or against the premise [(sic)].

MS. HARADA: Okay. Now, if you could turn your attention to exhibit 4 -- oh, I'm sorry. And may I have exhibit 2 entered into evidence.

THE COURT: Any objection, Mr. Artero?

DEFENDANT: No objection, Your Honor.

THE COURT: Exhibit 2 is admitted into evidence.

MS. HARADA: Take a look at exhibit 4. And can you identify for us what that is.

WITNESS: Basically -- this is a letter to the Hale Umi Association through Certified, notating that instead of sending the maintenance fees coupons, statements, et cetera, directly to the unit, it has been changed to sending it to Paul Artero, in care of SDCI Collection.

MS. HARADA: And that document is signed?

A Signed by Paul Artero on April 24 '94.

MS. HARADA: Okay. And this document was provided to Certified Management?

A Yes.

MS. HARADA: And the instructions were to forward the billing information to this other address.

WITNESS: Yes.

MS. HARADA: And that information was imputed [(sic)] into the Certified computers?

A Yes.

MS. HARADA: And you've been following that instruction ever since.

WITNESS: Yes.

MS. HARADA: Certified has not received any written instructions signed by Mr. Artero to change that billing address?

A No.

MS. HARADA: And Certified has not received any information indicating that the agreement of sale has been canceled.

WITNESS: No.

Q Okay. Now, is Mr. Artero current on his payments for Unit 3K?

A No, he's not.

MS. HARADA: Okay. I'm sorry. May I have exhibit 4 admitted into evidence.

THE COURT: Any objection, Mr. Artero?

DEFENDANT: No objection, Your Honor.

THE COURT: Okay. Exhibit 4 is admitted into evidence.

MS. HARADA: Take a look at what's been identified as exhibit 5. And tell me what is.

DEFENDANT [(sic)]: This is Certified's account ledger for Paul Artero, regarding his payment record from when we took the account over back in May 1, 1995, to current, which is June 12, 2001. It has a record of all of his payments. As far as his maintenance fees, what's owed, and the payment date that we have received the payment from him.

MS. HARADA: And this ledger reflects the records kept by Certified in the ordinary course of the Association's business?

A Yes.

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Q What does the ledger reflect regarding the last payment that was made?

A The last payment, according to our ledger, was done -- we received it on January 10, 2000.

MS. HARADA: Okay. And no further payments were made after that date?

A None.

Q And what is the total amount of maintenance fees currently owing?

A Currently owing maintenance fees, as of this period ending 6-14 is \$4,209.27, which includes late fees, and legal.

MS. HARADA: Okay. And what is the breakdown of the maintenance only?

A Maintenance, only, is \$2,529.45.

MS. HARADA: And the total amount of late fees that are owed?

A \$368.30.

MS. HARADA: And the balance are legal fees that have been -- that Certified has received billings for, thus far.

WITNESS: Yes.

MS. HARADA: Okay. I'd like to move exhibit 5 into evidence.

THE COURT: Any objection to that, Mr. Artero?

DEFENDANT: No, Your Honor.

THE COURT: Exhibit 5 is admitted into evidence.

Q What efforts did Certified make to collect the amounts that are owed?

A Initially after an account is 30 days past due, we would send them a friendly reminder letter saying hi, did you forget about us this month? If we had no response, we would send them -- and basically if you look at it, 60 days later, or another 30 days, we would send him another reminder letter, along with a statement saying, please pay us.

Thirty days after that, we would send him a final demand letter, informing the account that they are substantially past due, and the next go round would be turned over to the attorneys for resolution.

After 30 days had passed, and no response, we have turned it over to the attorney for resolution.

MS. HARADA: Okay. I have no further questions of this witness.

THE COURT: All right. Mr. Artero, this is your opportunity to cross examine Mr. Imamura if you have questions. All right?

CROSS EXAMINATION

BY MR. ARTERO:

MR. ARTERO: Mr. Imamura?

WITNESS: Hmmh?

MR. ARTERO: How long have you been the property manager for that complex?

A I took over the property management for Hale Umi about 45 days ago.

MR. ARTERO: Forty-five days ago. So you do not know if any of the bills were sent directly to me? Late notices, or anything?

A As far as I understand it to be in looking at your account file, we have sent them according to the proscribed [(sic)] address, which is SCDI [(sic)].

Q So what are your procedures, or policies, or practices, if

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somehow you're not getting any response when you're sending it to that address?

A We have gotten no rejection basically from the postal department, saying cannot contact, wrong address.

Q Do you have my other address on file?

A Yes.

MR. ARTERO: In fact, you have two of my addresses on file.

WITNESS: We have your --

MR. ARTERO: Actually you have three, if you include Savio.

WITNESS: We basically have your P.O. Box address also.

MR. ARTERO: Yeah, and the 719 Umi Street apartment . . . (tape inaudible) . . .

WITNESS: If you're looking at that -- yes.

Q Did you try to send messages or notices to those addresses?

A No, because again, based on the document we've gotten from Savio Development, everything was forwarded to that address.

MR. ARTERO: You see non-payment for over a year, and you don't think you should try at least to contact me directly?

A Basically again, we have no other means or authority to go outside --

Q Did Certified Management try to call me?

A Not to my knowledge.

MR. ARTERO: Okay, Your Honor. No further questions.

THE COURT: Any redirect, Miss Harada?

REDIRECT EXAMINATION

BY MS. HARADA:

Q Did Certified Management follow the instructions that was given to it?

A Yes.

MS. HARADA: Okay. And that instruction was to send the billing information, any delinquency notices and so forth, to the address that was given, which is the SDCI address.

WITNESS: Yes.

MS. HARADA: No further questions, Your Honor.

WITNESS: Oh, can I make a comment? It is not Certified's policy to call homeowners on past dues also.

THE COURT: Any follow-up questions, Mr. Artero?

MR. ARTERO: Just want to ask again. Did Certified try to contact me directly on the other two optional addresses?

A Not to my knowledge.

MR. ARTERO: Thank you, Your Honor. No further questions.

THE COURT: All right. You're done with your witness?

MS. HARADA: Nothing further, Your Honor.

THE COURT: All right. And you have no other witnesses.

MS. HARADA: No other witnesses.

THE COURT: Is that correct, Miss Harada? Okay. So your case is -- is --

MS. HARADA: We rest.

THE COURT: -- resting. Okay. At this point, Mr. Artero, it's your opportunity to either argue that they haven't proved their case, or put on your case.

MR. ARTERO: Do I argue from here, Your Honor?

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THE COURT: I'm sorry?
MR. ARTERO: Do I argue from here?
THE COURT: If you're going to testify, you need to come up and be sworn in.
MR. ARTERO: Okay.
THE COURT: Just come up here, and raise your right hand.

PAUL ARTERO,
the defendant, taking the witness stand on his own behalf, having been first duly sworn, testified as follows:

TESTIMONY BY DEFENDANT

THE COURT: Mr. Artero, since you don't have an attorney who's going to be asking you questions, you just need to tell the Court, and the plaintiffs and the counsel, your observations. And just confine it to factual matters because both sides will have opportunity to make legal arguments at the end of the case. All right?

DEFENDANT: In August, 1999, I received a summons of -- to foreclose, and cancel my agreement of sale, and because I didn't want to file for bankruptcy, I agreed. They said I need to -- I was summoned to respond in writing. I did. And I relinquished all rights to the property, and was to remain as a tenant.

So under that action, I believed that I was no longer the owner, and I -- when I first was contacted by Miss Harada's office, I called to tell them there must be a mistake 'cause I'm no longer the owner. It was canceled over a year ago.

And -- and so she did a title search, and she said she tried to contact Savio, and they said they were working on canceling it, and she said she waited and waited, and the next I heard from her is a summons to appear in court.

And since I couldn't make the first court date, I -- well, I contacted her, and I finally talked to her again on the phone after being summoned, she's saying that the title says that I'm still the owner, so I'm responsible.

And -- and so I couldn't make the first court date. I had a friend come in for me, so there was a continuance. And I -- for some reason, they didn't show up at the pre-trial that was scheduled after. And when they didn't show up at the pre-trial, the case was dismissed.

And then when they -- they set aside the dismissal, I objected, saying that this thing was canceled -- this agreement of sale has already expired. It's no longer valid.

And I submitted in my objection to the Court and to them, a copy of a court -- a document filed in the First Circuit Court, where it says that since this is a straight forward foreclosure cancellation of agreement sale case, alternative dispute resolution is not necessary.

So in my mind, I was under the complete understanding that this agreement of sale was canceled. So I don't feel like I'm responsible for these maintenance fees.

THE COURT: I don't mean to interrupt you, Mr. Artero, but the Court wants to make it clear. With whom did you have the agreement of sale?

A Savio Development.

THE COURT: So you had an agreement of sale with Savio --

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WITNESS: Right.

THE COURT: -- to purchase the --

WITNESS: The unit.

THE COURT: -- the property.

WITNESS: Right.

THE COURT: All right. And now you're saying that that was canceled.

WITNESS: In 1999. August, 1999.

THE COURT: August, 1999. And do you have records for that?

A I submitted a letter in writing, and because my computer crashed, I don't have a copy of it, but I do have this court document that they filed that this wasn't a cancellation foreclosure. But they're not going to proceed with, you know, trying to, I guess take me for court for being delinquent on my mortgage.

THE COURT: So, did you give -- do you have exhibits that you've given to the other side, or do you have --

WITNESS: I gave them a copy of this when I objected.

THE COURT: Okay. Do you know what he's talking about?

MS. HARADA: We -- I know what he's talking about, and I don't believe his interpretation of the document is correct. I -- I guess I'm standing to object, either to the testimony -- since he's testifying from a document, he should put the document in, if that's what he's going to do.

THE COURT: Well, that's my question, do you have a copy of this document --

WITNESS: I gave --

THE COURT: What is this document?

MS. HARADA: He showed it to me. It's basically the pre-trial statement from the action --

WITNESS: From the first --

MS. HARADA: -- by Savio --

THE COURT: From Savio --

WITNESS: Right.

MS. HARADA: -- to cancel the agreement of sale.

THE COURT: All right. Okay.

WITNESS: It's the last pages where it shows.

MS. HARADA: So it's - it is not a cancellation itself.

THE COURT: All right. As far as documentation of the cancellation of the agreement of sale, Mr. Artero, do you have any of that or --

WITNESS: No, I don't, Your Honor. I was -- when I received the first summons, it says whether I respond or not, this is going to foreclose, so that's my complete understanding, that it was going to foreclose. And so I did respond in writing, because I didn't want any more --

THE COURT: That's the agreement of sale that you're talking about --

WITNESS: Right.

THE COURT: -- in a separate action.

WITNESS: Right.

THE COURT: Okay. All right. So your understanding was that your interest had been foreclosed on. There was no longer an agreement of sale.

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WITNESS: Right. And the agreement of sale in fact was terminated and canceled. It was only a five year period, and that's already -- it was in 2000, the year 2000.

THE COURT: And you're still living on the property --

WITNESS: As a tenant.

THE COURT: -- and you pay rent to --

WITNESS: To their attorneys.

THE COURT: Okay. Do you have any evidence about that? That it's -- that you're making rental payments, as opposed to agreement of sale payments?

A I don't have evidence for that.

THE COURT: All right. I'm just trying -- I'm just saying that there's a dispute here about whether that agreement of sale was canceled, which would affect whether there's a property --

WITNESS: Right.

THE COURT: -- property maintenance fees due.

WITNESS: Uh-huh.

THE COURT: All right.

WITNESS: Also, I noticed on exhibit 3 that was not submitted from the plaintiff, it's the title insurance. And it says that on schedule A, number 3, that the interest in the land is Savio Development's.

I don't know if that -- you know, if that points out who's the owner, who's the actual owner, according to this title report.

THE COURT: Okay. The title report -- did you want to have the title report admitted into evidence? Is that what you're saying?

WITNESS: Yes. Yes, Your Honor.

THE COURT: Plaintiffs exhibit 3.⁷ Is there any objection to that, Ms. Harada?

MS. HARADA: No, Your Honor.

THE COURT: All right. So this is dated when?

MS. HARADA: It was obtained May 9th.

THE COURT: I'm sorry?

MS. HARADA: May 9th of this year.

THE COURT: Of this year?

MS. HARADA: Uh-huh.

THE COURT: Okay. All right. The Court's noting that this document shows on page -- on Schedule A, page 1, that the fee simple land interest is owned by Savio Development, but the noting Schedule B (2), page 4, noting an agreement of sale from April '95 -- is that your understanding of when --

WITNESS: Right.

⁷ Exhibit 3 is a copy of a title insurance commitment, for relevant purposes a title report, issued to Savio as the fee simple owner on the May 9, 2001 commitment date, on apartment 3-K of the Hale Umi condominium project. Among various easements and encumbrances, including the Association's by-laws, is listed an agreement of sale dated April 23, 1995, between seller Savio and purchaser Artero, along with a notice of pendency of an action to cancel the agreement of sale brought by plaintiff Savio against defendant Artero. Also listed in the commitment is a notice of lien dated November 15, 2000, in the amount of \$1,559.50, by claimant Savio against Artero. Exhibit 3 contains no mention of a cancellation of the agreement of sale.

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THE COURT: -- you first made the agreement of sale?

WITNESS: Right. And that agreement of sale was for five years.

THE COURT: Right. And noting below that, an action to cancel the agreement of sale filed in 1999.

WITNESS: And I agreed to that, Your Honor.

THE COURT: Okay. I'm just looking at what's -- all right. Did you have any other testimony you wanted to add here, so as far as --

DEFENDANT: Well, I was thinking I -- because of their claims and everything, that maybe I'm still entitled -- or I mean responsible to this, and it's -- this property still be belonged to me, so I tried to settle, but I didn't -- I couldn't see paying such a high amount in attorney's fees --

MS. HARADA: Your Honor, I'm going to object to this pursuant to --

THE COURT: Yeah, it's argument. I just want to know factually what happened.

DEFENDANT: Right.

THE COURT: Okay. Did you want to cross examine then, Miss Harada?

CROSS EXAMINATION

BY MS. HARADA:

MS. HARADA: Mr. Artero, when you responded to the summons to cancel the agreement of sale, this was just a letter that you prepared?

A Yes.

Q Okay. Did you sign any other documents, such as the agreement of sale that was signed, and so forth. Did you sign anything like that to cancel the agreement of sale with Savio?

A No. The only -- the only thing I signed was a letter I submitted, canceling the agreement.

Q Okay. And have you attempted to contact Savio Development to find out why they haven't canceled the agreement of sale?

A I did try to contact them, and they told me that the person who was handling the case was no longer there.

MS. HARADA: Okay. And this was the attorney's office?

A Right.

Q Okay. And did you ask if somebody else could help you?

A No. After that I didn't try and contact them.

MS. HARADA: Okay. And didn't I inform -- didn't I recommend to you that you go and attempt to contact Savio Development to obtain cancellation of this agreement of sale?

A Yes, you did.

MS. HARADA: Okay. And that has not happened as of this time.

WITNESS: No, 'cause it's under my understanding, after I found -- I dug through my apartment, and when I found this court file, that it was a clear case of foreclosure and cancellation, I figured I didn't need to.

Q Okay. And did you see an attorney about that document, to have an attorney help you with interpreting of what document meant?

A No. You're the only one who counseled me on that.

MS. HARADA: I have no further questions.

THE COURT: All right. [I]s there anything you wanted to add, Mr. Artero?

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DEFENDANT: I guess that's all at the moment, Your Honor.

THE COURT: Okay. You can step down. All right. Closing argument, Miss Harada?

MS. HARADA: Yes. We have shown that Mr. Artero is the vendee under an agreement of sale with Savio Development for the property at apartment 3K at the Hale Umi. And that pursuant to the by-laws, he, as the vendee under the agreement of sale, is responsible for the payment of maintenance fees on the property, as well as late fees as indicated in the by-laws, and attorney's fees and costs.

We have also shown that Mr. Artero signed instructions to Certified Management to send billing information -- any billing information that might be required to SDCI Collections, and that Certified Management has been following that instruction.

We've also shown that the title report does reflect that the legal owner of the property is Savio Development, but that Mr. Artero as the vendee under an agreement of sale is the equitable owner of the property, and that the agreement of sale as of May 9th is current, has not been canceled.

There has been no evidence to show that there was any cancellation subsequent to that May 9th title report.

We also have shown the amounts that are owed for the maintenance fees and late fees.

And Mr. Artero claims that there was a cancellation of the agreement of sale by his letter to Savio, responding to the summons regarding the cancellation of the agreement of sale.

He has admitted that there is -- there was no other document signed. That he has taken very minimal action in terms of trying to follow up on that cancellation of agreement of sale. And the evidence has shown that he is -- he continues to be the owner of the property under the agreement of sale.

The document that Mr. Artero referred to is a pre-trial statement. It was the last document that was in the docket for that action, and there has been no further action after that date, in terms of moving forward with cancellation of the agreement of sale.

THE COURT: Do you have the docket, Miss Harada?

MS. HARADA: I have --

THE COURT: I'm sorry, Miss Harada. Did you give me a copy of your pre-trial statement?

DEFENDANT: I think I did, Your Honor.

MS. HARADA: May I approach, Your Honor?

THE COURT: Yes.

DEFENDANT: Here's a copy, if you don't have it.

THE COURT: All right. So the docket,⁸ and just note for the record, shows a complaint filed, notice of pendency of action, return and acknowledgement. Some other requests to clerk.

Notice of proposed -- let's see what we have -- request to enter a default, notice of proposed dismissal. Plaintiff's objection to the notice of proposed dismissal, that would be Savio. Notice for payment

⁸ The "docket" the court was perusing and the pretrial statement referred to were not admitted into evidence and are not in the record on appeal.

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of fees. Order withdrawing notice of proposed dismissal was the last thing with Savio.

MS. HARADA: Oh, that top page. I had flipped to the --

THE COURT: And the pre-trial statement filed by Savio. Okay. All right. Did you have any further argument?

MS. HARADA: Yes. We also request leave to file an affidavit regarding the attorney's fees that have been incurred to date, pursuant to the by-laws provision, and also [Hawaii Revised Statutes (HRS) § 514A-94 (Supp. 2002)].

THE COURT: All right.

MS. HARADA: Thank you, Your Honor.

THE COURT: All right. Mr. Artero, did you want to add anything?

DEFENDANT: Yes. I was under the understanding that this agreement of sale was canceled in 1999. I believe that the property management did not exercise due diligence in trying to contact me through the alternate means, besides just that one address, when they actually had my other address on file, otherwise I could have addressed this before they actually hired an attorney. We could have worked this out much sooner, without as great an expense.

And when I was first notified about this, I did my best. I searched all up and down my apartment to look for these documents, and when I found this pre-trial statement, I thought it was satisfaction to prove that I was no longer in this agreement of sale. That the agreement of sale was indeed canceled.

And after I contacted the plaintiff's attorney the first time, I did not know she was in contact with Savio during that time frame like seven or eight months, and that she was waiting for them to cancel it.

And -- I guess that's about it, Your Honor.

THE COURT: Okay. The Court is ready to rule. The Court finds that plaintiff's case is for non-payment of maintenance fees, but note that the Court has a serious question about whether defendant in this case is in fact the owner and the person responsible for the maintenance fees beyond 1999.

Note the record shows the defendant faithfully paid maintenance fees through I guess January of 2000. The Court notes that there is a serious question here because there was a foreclosure cancellation of agreement of sale instituted by the original developer-owner Savio.

That exhibit 3, title report, shows that in fact Savio is the owner. Reflects the agreement of sale, and notes the pendency of the foreclosure action.

The Court notes the fact that Savio has failed to follow through with getting an actual default judgment, after a default was in fact entered, and not contested by the defendant in this case.

The Court finds that in the Court's opinion, defendant is not the party responsible for the payment of these maintenance fees, any late fees, or any legal fees in this case. And frankly finds that plaintiffs could in fact, as defendant argues, been more diligent in determining who in fact legally was responsible for the payment of the fees, which to this Court's opinion appears to be Savio Development Company.

And the fact that Savio wants to hold off on filing a cancellation of an agreement of sale for whatever reason is not -- is not a reason to hold this defendant responsible for these payments.

And the Court finds that the defendant who is not represented by

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counsel was under the honest belief that he was no longer the equitable owner of the property, and therefore responsible for the maintenance fees.

And the Court finds therefore, plaintiff, Association of Apartment Owners of Hale Umi, has failed to prove that defendant is responsible for these sums claimed, by a preponderance of the evidence, and therefore enters judgment in favor of defendant in this case.

MR. ARTERO: Thank you, Your Honor. Are we dismissed?

THE COURT: Dismissed.

(Footnotes supplied.)

On October 29, 2001, the court entered its judgment in favor of Artero, along with its findings of fact, conclusions of law and order granting the judgment, which were essentially a verbatim transcription of the court's oral ruling at the conclusion of the bench trial. The Association filed timely notice of this appeal on November 26, 2001.

II. Issues Presented.

The Association raises three points of error on appeal:

1. Whether the district court erred in concluding that ARTERO was not the party responsible beyond 1999 for the maintenance fees or late fees owed to the ASSOCIATION because ARTERO was under the honest belief that he was no longer the equitable owner of the apartment although he never executed documentation cancelling his agreement of sale.

2. Whether the district court erred in finding that the ASSOCIATION could have been more diligent in determining who was legally responsible for the payment of the delinquent fees.

3. If so, whether the district court committed reversible error by failing to award legal fees to the ASSOCIATION pursuant to HRS § 541A-94 [(sic)].

Opening Brief at 2-3 (capitalization in the original).

III. Standards of Review.

A. *Findings of Fact and Conclusions of Law.*

On appeal, the trial court's findings of fact are reviewed under the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding,

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or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made.

Conclusions of law, however, are not binding on an appellate court and are freely reviewable for their correctness. We thus review the conclusions of law *de novo*, under the right/wrong standard.

Alejado v. City & County of Honolulu, 89 Hawai'i 221, 225, 971

P.2d 310, 314 (App. 1998) (block quote format and citation

omitted). "We have defined 'substantial evidence' as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion."

State v. Kotis, 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999)

(citation and some internal quotation marks omitted).

B. Attorneys' Fees and Costs.

This court reviews the circuit court's denial and granting of attorney's fees under the abuse of discretion standard. The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

TSA Int'l Ltd., v. Shimizu Corp., 92 Hawai'i 243, 253, 990 P.2d

713, 723 (1999) (brackets, citations and internal quotation marks omitted).

IV. Discussion.

In our attempts to parse the basis for the court's ruling, several possibilities presented themselves. However, in each scenario of decision, the court's conclusion would be wrong as a matter of law. Alejado, 89 Hawai'i at 225, 971 P.2d at 314.

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First, the court appears to have concluded that it was Savio, fee simple owner of the apartment per the title report, that was liable, simply as such, for the maintenance fees and late charges. This would be imprecise and impuissant at the outset. The terminology in the title report notwithstanding, Savio as seller under the agreement of sale held a mere lien or encumbrance on the realty and not an interest in the land:

In accordance with the agreement of sale, "title" to the property remained in the seller. In this context, the seller's interest is sometimes described as a lien serving as security for the payment of the purchase price. However, the lien, like every other equitable lien, is not an interest *in the land* but is merely an encumbrance.

Beneficial Hawaii, Inc., v. Kida, 96 Hawai'i 289, 313, 30 P.3d 895, 919 (2001) (brackets, ellipsis, citations and some internal quotation marks omitted; emphasis in the original). The court's conclusion would also be incorrect in its result in any event, for the Association's by-laws and the agreement of sale both dictated that the agreement of sale purchaser -- Artero -- be held responsible for the maintenance fees, no matter who is deemed fee simple titleholder under the agreement of sale.

A second possible basis for the court's ruling is that, although no cancellation of the agreement of sale had been registered or even executed pursuant to Artero's default in Savio's foreclosure action, the fact of Savio's purported delay in doing so and Artero's "honest belief" that it had been done

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made it somehow inequitable, even as against the Association, to hold the *pro se* Artero responsible for unpaid maintenance fees and late charges. This conclusion, a perceived equitable judgment, would be inappropriate. This was an action at law and not in equity. The Association's by-laws authorized collection of unpaid maintenance fees and late charges "[b]y suit . . . at law" and the Association brought its suit for monetary damages:

The general principle is that equity will not take jurisdiction when the complainant has a complete and adequate remedy at law. That rule does not apply, however, and this is one of the exceptions, when the claim of the complainant is of an equitable nature and admits of a remedy in a court of equity only.

Beneficial Hawaii, Inc., 96 Hawai'i at 312, 30 P.3d at 918

(brackets, citation and block quote format omitted).

A third possible explanation for the court's ruling is that the court somehow concluded that Savio and Artero had executed -- but not registered -- a cancellation of the agreement of sale and hence, Artero was thereafter relieved of the obligation to pay maintenance fees to the Association. This, again, would be incorrect as a matter of law.

To allow the assertion of unregistered rights, be they legal or equitable, would be to subvert the obvious intent and purpose of the title registration system. The integrity of titles can only be preserved if anyone dealing with registered property is assured that the only rights or claims of which he need take notice are those which are registered in the prescribed manner. If for that reason alone, the provisions of the title registration statute must be allowed to prevail over any contravening doctrine of the common law.

Waikiki Malia Hotel, Inc. v. Kinkai Properties Limited

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Partnership, 75 Haw. 370, 392, 862 P.2d 1048, 1060-61 (1993) (brackets and block quote format omitted) (quoting Honolulu Memorial Park, Inc. v. City & County of Honolulu, 50 Haw. 189, 193-94, 436 P.2d 207, 210 (1967) (citing Akagi v. Oshita, 33 Haw. 343 (1935))). See also HRS §§ 501-101 (1993)⁹ & 501-102 (Supp. 2002)¹⁰; City & County of Honolulu v. A.S. Clarke, Inc., 60 Haw. 40, 47, 587 P.2d 294, 299 (1978) (citing HRS § 501-101 and holding that a prior but unregistered letter purporting to lease the subject Land Court property could not bind the county in its

⁹ HRS § 501-101 (1993) provides:

An owner of registered land may convey, mortgage, lease, charge, or otherwise deal with the same as fully as if it had not been registered. The owner may use forms of deeds, mortgages, leases, or other voluntary instruments like those now in use and sufficient in law for the purpose intended. No deed, mortgage, or other voluntary instrument, except a will and a lease for a term not exceeding one year, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the registrar or assistant registrar to make registration. The act of registration shall be the operative act to convey or affect the land, and in all cases under this chapter the registration shall be made in the office of the assistant registrar in the bureau of conveyances, during office hours prescribed in section 502-32. The rules of court may provide for forms of conveyances respecting registered land.

¹⁰ HRS § 501-102(a) (Supp. 2002) provides:

Every conveyance, lien, attachment, order, decree, instrument, or entry affecting registered land, which would under existing laws, if recorded, filed, or entered in the bureau of conveyances, affect the real estate to which it relates, shall, if registered, filed, or recorded, or entered in the office of the assistant registrar in the bureau of conveyances, be notice to all persons from the time of such registering, filing, recording, or entering and shall contain a reference to the number of the certificate of title and an indorsement of the current certificate of title, if applicable, of the land to be affected.

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condemnation action); Packaging Products Co., Ltd. v. Teruya Bros., Ltd., 58 Haw. 580, 585, 574 P.2d 524, 528 (1978) (citing HRS § 501-101 and holding that a purported bill of sale of Land Court property recorded in the Bureau of Conveyances, but not registered in the Land Court, "did not operate as a conveyance of this particular parcel"). Thus, even assuming, *arguendo*, that Savio and Artero had executed between themselves a cancellation of their agreement of sale, this act could not bind the Association or affect its recourse to Artero for maintenance fees and late charges in the absence of registration of the cancellation in the Land Court. There was absolutely no evidence of such registration presented to the court at trial. The title report instead indicated that the agreement of sale remained in effect at the time of trial, albeit pending Savio's action to foreclose upon or cancel it. This was then, as a matter of law and policy, the state of affairs with respect to the apartment beyond the ambit of the contractual relationship between Savio and Artero, which in turn defined Artero's obligations to a third party like the Association, as a matter of law.

In the same general vein, but closer to the specific heart of the matter, we observe that Artero purchased the apartment subject to the provisions of the by-laws of the Association previously registered in the Land Court. Hence,

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because he remained the purchaser under the agreement of sale at the time of trial, supra, Artero remained bound by his obligation under the by-laws to pay the maintenance fees and any late charges thereon. HRS § 501-82(a) (Supp. 2002).¹¹ This is the flip-side of the general rule as it is usually applied:

If, as we hold, a certificate of title is unimpeachable and conclusive except as otherwise provided by law, it would be illogical to say that it may be impeached if the purchaser for value had knowledge of an existing unregistered encumbrance. To do so would be to rob a certificate of title of its conclusive and unimpeachable character and place it in the same category as the ordinary record in the bureau of conveyances. If the intent and purpose of the law pertaining to the registration of land titles is to be preserved, the integrity of certificates of title must be scrupulously observed and every subsequent purchaser of registered land who takes a certificate of title for value, except in cases of fraud to which he is a party, is entitled under the provisions of [Revised Laws of Hawaii 1935] section 5401 [(predecessor of HRS § 501-82)] to hold the same free from all encumbrances except those noted on the certificate and the statutory encumbrances enumerated.

Waikiki Malia Hotel, Inc., 75 Haw. at 391, 862 P.2d at 1060

(block quote format omitted; brackets in the original) (quoting In re App'n of Bishop Trust, 35 Haw. 816, 825 (1941)). See also A.S. Clarke, Inc., 60 Haw. at 44-46, 587 P.2d at 297-98 (citing HRS § 501-82 (1976) and holding that the county's registered condemnation *lis pendens* must always trump an earlier but unregistered letter purporting to lease the subject Land Court

¹¹ HRS § 501-82(a) (Supp. 2002) provides, in relevant part:

Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, hold the same free from all encumbrances except those noted on the certificate in the order of priority of recordation[.]

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property); Packaging Products Co., Ltd., 58 Haw. at 585-86, 574 P.2d at 528-29 (citing HRS § 501-82 and holding that a registered purchaser of Land Court property took free and clear of an earlier bill of sale recorded in the Bureau of Conveyances but not registered in the Land Court, regardless of the buyer's actual or constructive knowledge of the bill of sale); Honolulu Memorial Park, Inc., 50 Haw. at 191-93, 436 P.2d at 209-10 (citing a predecessor statute to HRS § 501-82 and holding that a registered purchaser of Land Court property took free and clear of an unregistered, *mesne* grant of easement, regardless of the purchaser's knowledge of the easement).

Thus, we conclude that under any scenario of the court's decision, the decision was incorrect as a matter of law, Alejado, 89 Hawai'i at 225, 971 P.2d at 314, and the judgment must be vacated. *Ipsa facto*, we need not reach the Association's second point of error, and it is for the court on remand to consider the subject of the Association's third point of error.

V. Conclusion.

The court's October 29, 2001 judgment, and the findings of fact, conclusions of law and order of even date, are vacated and the case is remanded for entry of judgment in favor of the Association and against Artero, and for further proceedings not inconsistent with this opinion.

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DATED: Honolulu, Hawaii, July 25, 2003.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge